Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

91-1258
No. 91-1285

In The

Supreme Court of the United States

October Term, 1991

JAMES BOYD AND ELIZABETH BOYD,

Petitioners,

v.

FORD MOTOR COMPANY; ROUGE STEEL COMPANY; THE MOTOR VESSEL M.S. HENRY FORD, II,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARY L. HAYDEN
Counsel of Record
Ford Motor Company
1500 Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126
(313) 322-6746

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court eliminated the requirement for a vessel to be "in navigation" for Jones Act and unseaworthiness actions.

2. Whether the trial court erred in ruling that Respondents were entitled to summary judgment when the undisputed facts showed that the vessel in question was in winter layup and not "in navigation" when Petitioner was injured.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Ford Motor Company's non-wholly owned subsidiaries are listed in Appendix A. Rouge Steel Company's list of parent companies and non-wholly owned subsidiaries are listed in Appendix B.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT DID NOT ELIMINATE THE "IN NAVIGATION" REQUIREMENT IN WILANDER 3

II. THE COURT OF APPEALS DECISION IN THIS CASE IS NOT IN CONFLICT WITH THE FIFTH CIRCUIT'S TEST FOR SEAMAN STATUS 5

III. WHEN ALL MATERIAL FACTS ARE UNDISPUTED, THE QUESTION OF WHETHER A VESSEL IN WINTER LAYUP IS "IN NAVIGATION" IS PROPERLY RESOLVED BY THE COURT AS A MATTER OF LAW 7

CONCLUSION 11

APPENDIX A

RULE 29.1 LIST OF SUBSIDIARY COMPANIES FOR FORD MOTOR COMPANY ..... App. 1

APPENDIX B

RULE 29.1 LIST OF SUBSIDIARY COMPANIES FOR ROUGE STEEL COMPANY ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 9

Baumgartner v. United States, 322 U.S. 665 (1944)..... 8

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 8

Bullis v. Twentieth Century – Fox Film Corp., 474 F.2d 392 (9th Cir. 1973)..... 6

Butler v. Whiteman, 356 U.S. 271 (1958)..... 5, 8, 10

Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941)..... 6

Caruso v. Sterling Yacht & Shipbuilders, Inc., 828 F.2d 14 (11th Cir. 1987).....7, 9

Davis v. United States, 417 U.S. 333 (1974) 10

Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir.), *cert. denied* 404 U.S. 995 (1971) 9

Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) 2, 5, 7, 9, 10

Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), *cert. denied* 423 U.S. 1054 (1976) 6

Hawn v. American S.S. Co., 107 F.2d 999 (2d Cir. 1939)..... 6

McCown v. Humble Oil & Refining Co., 405 F.2d 596 (4th Cir.), *cert. denied* 395 U.S. 934 (1969) 6

McDermott International, Inc. v. Wilander, 498 U.S. ___, 111 S. Ct. 807 (1991) 2, 3, 4, 8

McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953)..... 6

TABLE OF AUTHORITIES – Continued

Page

Noack v. American Steamship Co., 491 F.2d 937 (6th Cir. 1974) 10

Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) ...4, 5

Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc., 788 F.2d 264 (5th Cir.), *cert. denied* 479 U.S. 885 (1986) 5, 6, 9

Roper v. United States, 368 U.S. 20 (1961) 5, 8

Southwest Marine, Inc. v. Gizoni, 502 U.S. ___, 112 S. Ct. ___ (1991) 4

Sweeney v. American Steamship Co., 491 F.2d 1085 (6th Cir. 1974) 10

Tuder v. Material Service Corp., 177 F. Supp. 71 (D.C. Ill. 1959) 6

West v. United States, 361 U.S. 118 (1959) 8

Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), *cert. denied* 346 U.S. 817 (1953) 6

Williams v. Avondale Shipyards, Inc., 452 F.2d 955 (5th Cir. 1971) 6

Wixom v. Boland Marine & Mfg. Co., 614 F.2d 956 (5th Cir. 1980) 9

STATUTES

28 U.S.C. § 1333(1) 1

OTHER AUTHORITIES

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 205 (6th ed. 1986) 10

Respondents Ford Motor Company ("Ford") and Rouge Steel Company ("Rouge Steel") respectfully ask this Court to deny the petition for a writ of certiorari, seeking review of the Sixth Circuit's decision in this case.

STATEMENT OF THE CASE

This case was commenced in the United States District Court for the Eastern District of Michigan, Southern Division. Jurisdiction was based on the federal courts' original and exclusive jurisdiction over civil admiralty and maritime cases, 28 U.S.C. § 1333(1).

Plaintiffs (Petitioners in this Court) filed a two-count complaint against Defendants (Respondents) Ford Motor Company, Rouge Steel Company, and The Motor Vessel MS Henry Ford II on March 28, 1990. Plaintiffs alleged that James Boyd was injured on four separate occasions while working on the vessel. The last of these incidents, which is the subject of this appeal, occurred on February 11, 1987, while the vessel was in winter layup. In Count I of the Complaint, Plaintiffs sought relief under the Jones Act, alleging that Mr. Boyd was a seaman performing his duties on the vessel on each occasion when he was injured. In Count II, Plaintiffs alleged that the vessel and the dock adjacent to the vessel were unseaworthy, resulting in Mr. Boyd's injuries.

Defendants moved for summary judgment, which was granted in part.[1] The District Court ruled that

[1] Plaintiffs' claims for maintenance and cure, on which summary judgment was denied, were voluntarily dismissed.

Plaintiffs' Jones Act and unseaworthiness claims arising from the first three incidents were barred by the applicable statutes of limitations. With respect to the 1987 incident, the District Court held that Defendants were entitled to judgment as a matter of law because no reasonable jury could find from the undisputed facts that the vessel was "in navigation" when Plaintiff was injured and, therefore, no reasonable jury could find that Plaintiff was a "seaman" for purposes of the Jones Act.

Plaintiffs appealed the final judgment to the Sixth Circuit, which affirmed the trial court's judgment.

SUMMARY OF ARGUMENT

The plain language of this Court's opinion in *McDermott International, Inc. v. Wilander*, 498 U.S. ___, 111 S. Ct. 807 (1991), and other decisions shows that a person presenting an unseaworthiness claim or a claim under the Jones Act must show that the vessel in question was "in navigation" at the time of the injury. These cases have been consistently followed by the Circuit Courts.

The holding of this Court in *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 189 (1952), established that vessels in winter layup are not "in navigation" as a matter of law. There is no conflict among the Circuits on this question.

ARGUMENT

I. THIS COURT DID NOT ELIMINATE THE "IN NAVIGATION" REQUIREMENT IN WILANDER.

Petitioners assert that this Court eliminated the "in navigation" requirement in its recent decision in *McDermott International, Inc. v. Wilander*, 111 S. Ct. 807 (1991). This argument is erroneous. *Wilander* involved a challenge to the requirement that a person "aid in navigation" to have seaman status for Jones Act purposes. The Court "jettison[ed] the aid in navigation language" and held that a claimant is not precluded from seaman status simply because he did not perform "transportation-related functions." 111 S. Ct. at 816, 818.

At the same time, the Court affirmed the long-standing rule that seaman status requires a showing that the vessel was "in navigation" at the time of the injury. In fact, this Court expressly stated that "[t]he **key** to seaman status is employment-related connection to a vessel **in navigation**." (emphasis added) 111 S. Ct. at 817. The Court also said that "the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act solely in terms of the employee's connection to a vessel **in navigation**." (emphasis added) *Id.* The Court observed that defining a seaman in terms of his connection to the vessel explained the Court's prior case law and is consistent with pre-Jones Act interpretations of "seaman" and with Congress' distinction between land-based workers (covered by the LHWCA) and sea-based workers (covered by the Jones Act). *Id.* This definition also effects the policy underlying maritime law of limiting its benefits to "[a]ll who work at

sea in the service of a ship [and] face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.*

This Court recently reaffirmed the "in navigation" requirement. In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ___, 112 S. Ct. 486 (1991), this Court resolved a conflict between decisions from the Fifth and Ninth Circuits concerning the exclusive remedy provision of the LHWCA. In *Gizoni*, the District Court had granted the defendant's motion for summary judgment, holding that the floating platform on which he was employed was not a "vessel in navigation", that the plaintiff did not "aid in navigation", and that the plaintiff was a harbor worker and thus was precluded by the exclusive remedy provisions of the LHWCA from bringing an action under the Jones Act. 112 S. Ct. at 494. The Ninth Circuit reversed the determinations that Gizoni was not a seaman as a matter of law and that he was limited to remedies under the LHWCA. This Court affirmed the Ninth Circuit's decision, basing its decision in part on the determination that "questions of fact existed regarding whether the floating platforms were vessels 'in navigation' ", and reasserting the requirement stated in *Wilander* that "only 'employment-related connection to a vessel in navigation' is required" for seaman status under the Jones Act. 112 S. Ct. at 494, n. 6.

Plaintiff also argues that the Court must have intended to eliminate the "in navigation" requirement in *Wilander* because the Court "adopted" the Fifth Circuit's test for seaman status from *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). This argument is erroneous in

several respects. First, as noted above, the express language of the *Wilander* opinion demonstrates that the "in navigation" requirement is viable and healthy. Second, if *Robison* eliminated the "in navigation" test, it did so contrary to Supreme Court precedent. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 191 (1952); *Butler v. Whiteman*, 356 U.S. 271 (1958). As discussed below, however, decisions from the Fifth Circuit after *Robison* show that the Circuit did not abandon the "in navigation" requirement.

Third, this Court applied the "in navigation" requirement in other cases decided after *Robison*. *West v. United States*, 361 U.S. 118 (1959); *Roper v. United States*, 368 U.S. 20, 23-24 (1961) ("Since we are unwilling to upset the trial court's factual determination that the S.S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. (Citations omitted) This limitation is analogous to that applied in libels under the Jones Act, where it has long been held that recovery is precluded if the ship is not a vessel 'in navigation.' ")

II. THE COURT OF APPEALS DECISION IN THIS CASE IS NOT IN CONFLICT WITH THE FIFTH CIRCUIT'S TEST FOR SEAMAN STATUS.

Petitioners argue that the "in navigation" requirement applied by the Sixth Circuit in this case conflicts with the Fifth Circuit test announced in *Robison*. Subsequent Fifth Circuit decisions show, however, that the "in navigation" requirement was not abandoned in *Robison*. In *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264 (5th Cir.), *cert. denied* 479 U.S. 885 (1986), the Court applied the *Robison* test and held that

> [I]t is clear in the present case that Reynolds cannot satisfy the first prong of the *Robison* test since the Ticonderoga was not a "vessel in navigation." Without a vessel in navigation, however, there can be no Jones Act coverage.

788 F.2d at 267. Thus, implicit in the *Robison* requirement that the injured workman be assigned permanently to a vessel or perform a substantial part of his work on the vessel is the requirement that the vessel in question be "in navigation".

Even if the Fifth Circuit intended to eliminate the "in navigation" requirement, its ruling would have conflicted with past and future Supreme Court authority, its own past and future decisions, and apparently with decisions of every other Circuit that addressed the question. *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) (cited with approval in *Robison*) ("[O]ne who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act."); *Hawn v. American S.S. Co.*, 107 F.2d 999, 1000 (2d Cir. 1939); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36-37 (3d Cir. 1975), *cert. denied* 423 U.S. 1054 (1976); *McCown v. Humble Oil & Refining Co.*, 405 F.2d 596, 597-98 (4th Cir.), *cert. denied* 395 U.S. 934 (1969); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971); *Reynolds*, 788 F.2d at 267; *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir.) *cert. denied* 346 U.S. 817 (1953) (also cited with approval in *Robison*); *Tuder v. Material Service Corp.*, 177 F. Supp. 71 (D.C. Ill. 1959); *Bullis v. Twentieth Century – Fox Film Corp.*, 474 F.2d 392, 393 (9th Cir. 1973);

Caruso v. Sterling Yacht & Shipbuilders, Inc., 828 F.2d 14, 15 (11th Cir. 1987).

III. WHEN ALL MATERIAL FACTS ARE UNDISPUTED, THE QUESTION OF WHETHER A VESSEL IN WINTER LAYUP IS "IN NAVIGATION" IS PROPERLY RESOLVED BY THE COURT AS A MATTER OF LAW.

The courts below expressly followed a decision of this Court in ruling that the MS Henry Ford II was not "in navigation", and that summary judgment was proper. The District Court and Circuit Court rulings are not in conflict with any decision from any other circuit court.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), this Court held that a worker performing repair work on a vessel was not a "seaman" because the vessel was laid up for the winter. 342 U.S. at 191. The facts in *Desper*, which the Court described as "unique", are closely analogous to the facts in this case.

Desper was employed during the sailing season as an operator of a sightseeing boat. He was terminated at the end of the 1947 sailing season and was re-employed in March 1948 to prepare the boats for navigation. He was to resume his sailing duties when the boats were back in the water. Desper was on a moored barge at the time he was fatally injured. 342 U.S. at 188-89. The Court held that

> It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act. The distinct nature of the work is emphasized by the

> fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been "laid up for the winter."

342 U.S. at 191.

This Court has also stated that the test for determining whether a ship is in navigation is the "status of the ship." *Roper v. United States*, 368 U.S. 20, 22-23 (1961); *West v. United States*, 361 U.S. 118, 122 (1959). Thus, the legal determination of whether a vessel is in navigation derives from the determination of the ship's status. The status of a ship is a question of fact. *Roper*, 368 U.S. at 22; *Butler v. Whiteman*, 356 U.S. 271 (1958).

The determination of whether the vessel is in winter layup is purely factual; the question of whether the vessel is "in navigation" implies the application of a standard of law. *See Baumgartner v. United States*, 322 U.S. 665, 671 (1944). Thus, the question of whether a vessel is "in navigation", like the related question of whether a claimant is a "seaman", may properly be characterized as a mixed question of law and fact. *See Wilander*, 111 S. Ct. at 818. The determination of whether a vessel is "in navigation" for purposes of Jones Act and unseaworthiness actions "crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise independent judgment." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 517, n. 17 (1984).

Answering this question necessarily implicates the policies and purposes underlying maritime law, and it

requires a determination by the court of whether application of the law to a particular set of facts effects those policies and achieves those purposes. Since employees working on vessels in winter layup are not subjected to "those particular perils to which the protection of maritime law, statutory as well as decisional, is directed", 111 S. Ct. at 817, the rule of law announced in *Desper* and applied in this case certainly effects those policy objectives. Thus, when the evidentiary facts are undisputed, as in this case, and these facts establish that the status of the ship was that it was in winter layup at the time the claimant was injured, the court must conclude that the vessel is not in navigation as a matter of law and enter judgment for the defendant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250-251 (1986).

The Court's rule that a vessel in winter layup is not "in navigation" is not unique. Various Circuit Courts have ruled that vessels with comparable statuses are likewise not "in navigation" as a matter of law. *See, e.g. Reynolds*, 788 F.2d at 267 (ship undergoing sea trials not "in navigation" for purposes of the Jones Act); *Caruso*, 828 F.2d at 16 (vessel launched and afloat but not yet tested and licensed held as a matter of law not to be "in navigation"); *Delome v. Union Barge Line Co.*, 444 F.2d 225, 232 (5th Cir.), *cert. denied* 404 U.S. 995 (1971) (ship withdrawn from navigation and undergoing major repairs not "in navigation."); *Wixom v. Boland Marine & Mfg. Co.*, 614 F.2d 956 (5th Cir. 1980).

The two decisions of the Sixth Circuit, holding that the question of whether a vessel in winter layup is "in navigation" should be decided by the fact-finder, are

simply wrong.[2] In both *Noack v. American Steamship Co.*, 491 F.2d 937 (6th Cir. 1974) and *Sweeney v. American Steamship Co.*, 491 F.2d 1085 (6th Cir. 1974), the Sixth Circuit relied on this Court's brief per curiam opinion in *Butler v. Whiteman*, 356 U.S. 271 (1958), in which the Court held that the petitioner's evidence, which was not explained, presented an evidentiary basis for jury findings as to whether or not the vessel in question was "in navigation".

The vessel in *Butler* was not in winter layup, however, but apparently had been withdrawn from navigation "for some months" and was undergoing repairs "presumably in anticipation of a return to service." 356 U.S. at 272 (Harlan, J., dissenting). The state of the evidentiary record in the case is unclear from the opinion, but apparently the evidence presented was sufficient to permit a reasonable fact-finder to conclude that the vessel was "in navigation". By contrast, from the evidence in *Noack*, *Sweeney*, and this case, no reasonable fact-finder applying the law of *Desper* to the facts could conclude that the vessel in question was "in navigation."

---

[2] Intracircuit conflicts are not generally a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974). Such conflicts are customarily resolved either by en banc rehearing or by later panels deferring to the decisions of earlier panels. *See* R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice 205 (6th ed. 1986).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

GARY L. HAYDEN
Office of the General Counsel
Ford Motor Company
Three Parklane Boulevard
1500 Parklane Towers West
Dearborn, Michigan 48126

Counsel for Respondents

APPENDIX A

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

Autolatina America, Inc.
Dearborn Capital Corporation
Dobco Life Insurance Company
Ford Holdings
Shoppers Mart, Inc.
The Hertz Corporation

Argentina

- Autolatina Argentina S.A. de Ahorro Para Fines Determinados
- Invercred Compania Financiera S.A.
- Transax Socieded Anonima, Comercial, Industrial y Financiera
- Volkswagen Inversiones S.A.
- Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

- Australian Road Credit Limited
- Foral Service Proprietary Limited
- Ford Motor Company of Australia Limited
- Ford Sales Company of Australia Limited

Belgium

- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Bermuda

- Financial Reassurance Company, Ltd.

Brazil
- Apolo Administradora de Bens S/C Ltda.
- Autolatina Brasil S.A.
- Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda
- Autolatina Financiadora S.A. – Credito, Financiamento e Inves
- Autolatina Leasing S/A – Arrandamento Mercantil
- Autolatina Previdencia Privada
- Autolatina S.A.
- Consorcio Nacional Ford Ltda.
- Consorcio Nacional Volkswagen Ltda.
- Ford Brasil S.A.
- Ford Distribudora de Productos de Petroleo Ltda.
- Fundacao Autolatina
- Inter-Locadora S/A
- Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
- Volkswagen Factoring Fomento Comercial S/A

Canada
- Ford Motor Company of Canada, Limited

Denmark
- Ford Credit A/S
- Ford Motor Company A/S

England
- A C Cars Limited
- Aston Martin (RDP) Limited
- Aston Martin Finance Limited
- Aston Martin Lagonda Design Limited
- Aston Martin Lagonda Limited
- Aston Martin Lagonda U.S.A., Inc.
- Aston Martin Sales Limited
- Lagonda Properties Limited

Finland
- Oy FORD Ab
- Oy Ford Credit Rahoitus

Holland
Ford Nederland B.V.

Japan
Japan Climate Systems Corporation *CCD*

Mexico
Altec Electronica Chihuahua, S.A. de C.V. *ED*

Netherlands
Ford Credit B.V.
Stuurgroep Holland B.V.

Norway
Ford Motor Norge A.S.

Singapore
Ford Motor Company Private Limited

Spain
Ford Credit S.A.

Sweden
Ford Credit AB
Ford Motor Company Aktiebolag
Ford Vagnskadegaranti AB

Switzerland
Ford Credit S.A.
Ford Motor Company (Switzerland) S.A.

Taiwan
Ford Taiwan Services, Limited

Venezuela
Ford Motor Credit S.A.

APPENDIX B

Worthington Industries, Chase Manhattan Capital Corporation and Ford Motor Company hold significant equity interests in Rouge Steel. Rouge Steel owns a significant (not necessarily controlling) interest in the following domestic companies:

Double Eagle Steel Coating Company

Eveleth Taconite Company